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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD L. ROSENFELD,

Petitioner,

v.

ARTHUR COHN and MICHAEL ARTHUR FILM PRODUCTIONS, a company doing business under the laws of Liechtenstein,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AND APPENDIX FOR PETITIONER

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QUESTIONS PRESENTED

Whether the citizenship of the real parties in interest of a trust formed in Liechtenstein must be considered for the purpose of determining whether diversity jurisdiction exists.

Whether the District Court may award damages based upon the lost profits that would have been obtained from an unlawful block-booking deal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AND APPENDIX FOR PETITIONER

Richard L. Rosenfeld ("Rosenfeld") petitions for a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, written by Judge Wallace, is dated April 25, 1984, and is reported at 733 F.2d 625. (App., *infra*, A1).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the United States Court of Appeals for the Ninth Circuit was rendered on April 25, 1984. Rosenfeld's motion for an order recalling mandate and extending the time to file his petition for rehearing en banc was denied on July 26, 1984. (App., *infra*, A 12). On July 16, 1984 and while Rosenfeld's motion was pending before the Court of Appeals, the Supreme Court, by Justice Rehnquist, extended the time for Rosenfeld to file his petition for writ of certiorari to and including August 31, 1984 (App., *infra*, A 13).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Art. VI, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; — to all cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U.S.C. §1332(a), (c) and (d):

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in

controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

. . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word 'states', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico,."

STATEMENT OF THE CASE

Respondents Michael Arthur Film Productions ("Michael Arthur") and Arthur Cohn sued Petitioner Richard L. Rosenfeld ("Rosenfeld") in the District Court for the

Central District of California when Rosenfeld was unable to perform his agreement to deliver seven old black-and-white films to Respondents. The territories covered by the Rosenfeld license included the Federal Republic of Germany, the German Democratic Republic, Austria and German-speaking Switzerland. Michael Arthur is a Liechtenstein business entity commonly known as an "anstalt" or "establishment", that was admittedly organized as a business trust. Rosenfeld is a citizen of California. When Michael Arthur was requested by the District Court to prove that its principals, owners and real parties in interest were not, in fact, citizens of California, it refused. Accordingly, their citizenship and identity is unknown.

In July of 1977 Rosenfeld granted to Michael Arthur and Cohn the exclusive rights to exhibit the seven old black-and-white films for a total consideration of $20,000. The seven Rosenfeld films are all old "B" movies and, as Cohn testified, "had no merit" except as "filler" in block-booking deals, a practice long illegal in California and the United States.

Months after acquiring the rights to these seven films, Michael Arthur's agent discussed a block-booking deal with one of the German television networks, known as ARD. Under this arrangement ARD would purchase a package of 30 films, for a flat 126,000 DM per film. Included in the package were "A" pictures like "Ryan's Daughter", a popular film worth much more than 126,000 DM. Since ARD's practice was not to pay more than 126,000 DM for any film, this 30-picture package was loaded with practically worthless old films, including three of the Rosenfeld films, to enable plaintiffs to receive in fact more than 126,000 DM for each of the "A" pictures.

In or about February of 1978, Rosenfeld learned that a previous licensee claimed an option to renew its exclusive

license to the same seven films Rosenfeld had licensed to Michael Arthur. Rather than pursue a lawsuit in Germany, Rosenfeld told Cohn that he could not deliver the seven films which were in the prior licensee's possession.

When Michael Arthur learned Rosenfeld could not deliver the seven films, including the three to be used as "filler" in the ARD package, Cohn instructed Michael Arthur's agent to terminate all discussions with ARD. Michael Arthur then prepared a package of 96 films, some of which were owned by Michael Arthur or Cohn, and some by a company called Art Films. This 96-film package was then sold to Curator, a Swiss finance company, for 100,000 DM each, or a total of 9,600,000 DM. Michael Arthur and Cohn then sued Rosenfeld for his failure to deliver the seven old black-and-white films.

After a non-jury trial, the District Court awarded Michael Arthur and Cohn damages in the amount of $350,000 (1750 percent of the purchase price of Rosenfeld's films), determined as follows: (1) 3,780,000 DM as profits lost because the ARD block-booking deal of 30 films, including three o Rosenfeld's films, was not consummated; plus (2) 6,570,000 DM as the amount Michael Arthur and Cohn would have received from a sale of 73 films that would have remained if Rosenfeld had delivered the seven films to Michael Arthur and it had sold 30 films to ARD, although many of the 73 films were not owned by Michael Arthur or Cohn; less (3) the 9,600,000 DM paid for the 96 films. This totals 750,000 DM or, when converted to U.S. dollars at the rate of exchange at the time, $350,000 for the failure to deliver seven old black-and-white films, which Cohn testified were worthless and unmarketable films by themselves.

After trial, Rosenfeld moved for a new trial. One of the grounds for his motion was the Court's lack of subject

matter jurisdiction. The original complaint had alleged that Michael Arthur was "a company duly organized and existing under the laws of Liechtenstein." When Rosenfeld challenged jurisdiction, a first amended complaint was filed which alleged that Michael Arthur was "a limited liability company duly incorporated and existing under the laws of Liechtenstein. . . ."

However, at trial it was learned that Michael Arthur is anything but a "corporation". Instead, it was revealed that Michael Arthur is a front, a loose association of four, five or more individuals who can make deals for their own account or for undisclosed principals, individually or collectively. The undisclosed principals can apparently elect to participate directly in ventures on a deal-by-deal basis. The sole common factor among Michael Arthur's various deals and its owners is the use of the company name.

At a special hearing on the issue of subject matter jurisdiction, it was admitted by Michael Arthur's own expert that Michael Arthur was an anstalt, that an anstalt can be organized as a corporation or as a business trust, and that Michael Arthur was in fact organized as a business trust. The Court invited Michael Arthur to disclose the identity of its real parties in interest to prove they were not citizens of California and put an end to the question of jurisdiction. Michael Arthur, however, refused and elected to base its claim of subject matter jurisdiction on the sole ground that Michael Arthur was a corporation. Rosenfeld contends that since Michael Arthur is not a corporation, it is not entitled to the conclusive presumption that its owners, principals and real parties in interest were citizens or subjects of the foreign state of incorporation. *See, Steamship Co. v. Tugman,* 106 U.S. 118 (1882). Notwithstanding the overwhelming evidence that Michael

Arthur was a business trust, the District Court found that it had diversity jurisdiction because anstalts are recognized as "juridical persons" under the laws of Liechtenstein, even when organized as business trusts, and therefore are "citizens or subjects of a foreign state" under Title 28, Section 1332(a) (2) even if they bear no resemblance to foreign corporations.

The Court of Appeals affirmed, holding *inter alia,* that all foreign juridicial entities are "citizens" or "subjects" under Section 1332(a) (2) irrespective of the citizenship of their principals, owners or real parties in interest, and that the District Court's findings regarding damages were not clearly erroneous. On July 12, 1984, Rosenfeld moved the Court of Appeals for an order recalling mandate and extending the time for him to file his petition for rehearing in banc. On July 26, 1984, the Appellate Court denied his motion.

REASONS FOR ALLOWING THE WRIT

1. In Holding That Diversity Exists In Every Case Between a United States Citizen And Any Association of Persons Recognized by a Foreign Government As a "Juridical Person", the Court of Appeals Has Expanded Diversity Jurisdiction In Conflict With the Decisions Of This Court and The Courts of Appeals Of the Other Circuits.

Although the Court of Appeals expressly stated that Rosenfeld persuasively argued that a Liechtenstein anstalt was a business trust and not a corporation, (App. at A5), it nevertheless held that this foreign business trust and all associations that are deemed "juridical persons" under foreign law are to be treated as subjects or citizens of a foreign state, irrespective of the citizenship of its members, owners, principals and real parties in interest. By this holding, the Court of Appeals extended the "conclusive

presumption" as to the decision of *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314 (1853) and applied by analogy to foreign corporations in *Steamship Co. v. Tugman*, 106 U.S. 118 (1882), "to foreign legal entities *of all kinds*, so long as the entity is considered a juridical person under the law that created it." (App. at A6, emphasis added). However, the opinion below is contrary to and unsupported by the history of that presumption and the decisions of this Court and of the Courts of Appeals of the other Circuits.

Federal courts are courts of limited jurisdiction and the presumption is against the existence of jurisdiction. *Fifty Associates v. Prudential Insurance Co, of America*, 446 F.2d 1187, 1190 (9th Cir. 1970). Diversity jurisdiction requires complete diversity of all real parties in interest. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978); *Dolch v. United California Bank*, 702 F.2d 178, 181-82 (9th Cir. 1983). Artificial legal entities are not citizens of any State and the citizenship of the real parties to the controversy determines whether there is diversity. *Navarro Savings & Loan Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980).

In 1853, this Court recognized a narrow exception to the rule that the "citizenship" of artificial entities is ignored by adopting a conclusive presumption that the members of a corporation created by the laws of a State are citizens of that State. *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314 (1853). By analogy to domestic corporations, this Court has applied the conclusive presumption to corporations formed under foreign law. *Steamship Co. v. Tugman*, 106 U.S. 118, 121 (1882). However, for 130 years this Court has consistently refused to extend this presumption to non-corporate domestic entities. *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965); *Great Southern*

Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 454-58 (1900) (Court on its own raises question of jurisdiction: limited partnership, although a new artificial person", is not a "citizen" for diversity purposes); *Chapman v. Barney,* 129 U.S. 677 (1888).

This conclusive presumption as to domestic corporations is now recognized by statute. 28 U.S.C. §1332(c); *Navarro Savings & Loan Ass'n v. Lee,* 446 U.S. 458, 461, n.7 (1980). However, that portion of Section 1332(c) that provides that a corporation is a citizen of its State of incorporation applies to domestic corporations only, Congress having defined "State" narrowly and to the exclusion of foreign states. *Jerguson v. Blue Dot Ins., Inc.,* 659 F2d 31, 32-35 (5th Cir. 1981), *cert. denied,* 456 U.S. 946 (1982); Wright, Miller & Cooper, *Federal Practice & Procedure,* 824-25 (1975 Ed.).

Arguably, the mere enactment of Section 1332(c) without provision for foreign corporations compels the conclusion that even foreign corporations must now prove diversity as to their owners, principals and real parties in interest. However, assuming that the conclusive presumption as to foreign corporations did survive the enactment of Section 1332(c), no Court, other than the Court of Appeals for the Ninth Circuit, has ever held that the conclusive presumption applies to *all* foreign business entities, limited partnerships, real estate investment trusts, business trusts or associations, irrespective of their form, structure of nature, or the citizenship of their real parties in interest, if they are recognized by foreign law as merely being a juridical person under foreign law.

To reach the unprecedented conclusion that all groups of people are conclusively presumed to be citizens of any foreign state that gives personality to their association, the Court of Appeals looked to this Court's decision in *Puerto*

Rico v. Russell & Co., 228 U.S. 476 (1933). Other attempts to use *Russell* so as to expand diversity jurisdiction to all juridical entities have been rejected by this Court and the decisions of the Courts of Appeal of the other Circuits. *See, e.g., Baer v. United States Automobile Ass'n.*, 503 F2d 393 (2d. Cir 1974); *R.H. Bouligny, Inc. v. United Steelworkers of America*, 336 F2d 160 (4th Cir. 1964) aff'd sub. nom., *United Steelworkers of America, AFL-CIO v. R.H. Bouligny*, 382 U.S. 145 (1965); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F.Supp. 425 (N.D. Ga 1975).

As the Fourth Circuit noted in *Bouligny, Russell* is not even a diversity case:

> "[T]he suit could on no theory be entertained as a diversity suit by an Article III court. . . .Clearly, the case does not by any stretch of the imagination hold that the *Sociedad* was a citizen of Puerto Rico for purposes of diversity jurisdiction of Article III. *Nor can the Court analogy between the civil law* Sociedad *and the common law corporation justify a contention that it was consciously expanded federal diversity jurisdiction.*"

336 F.2d at 163, emphasis added. The Court in *Bouligny* also noted that in adopting 28 U.S.C. § 1332(c) Congress specifically provided that *only* corporations, and *not* unincorporated associations that were "equivalent" to corporations, would be deemed citizens of the State under whose laws they were formed.
336 F.2d at 163-64.

The Court of Appeal's reliance on *Russell,* for the proposition that the conclusive presumption applicable to domestic and foreign corporations also applies to all types of foreign "juridical persons", is therefore misplaced. Such an interpretation greatly expands diversity jurisdiction,

while in point of fact this Court's decision in *Russell* worked to *limit* federal diversity jurisdiction. That is, *Russell* held that the conclusive presumption can be applied to non-corporate entities if the result is to *negate* federal jurisdiction and keep the case in the local Courts. *United Steelworkers of America, AFL-CIO, v. R.H. Bouligny, Inc.*, 382 U.S. 145, 151-52 (1965). ("It should be noted that the effect of Russell was to contract jurisdiction of the federal court in Puerto Rico."). *See, also,* Wright, Miller & Cooper, *Federal Practice & Procedure* 849 (1975 Ed.). The decision has been strictly limited to its facts and never used as broadly as in the decision of the Ninth Circuit, so as to blanketly extend diversity jurisdiction to foreign business entities of all kinds. *See* cases gathered in Wright, Miller & Cooper, *Federal Practice & Procedure,* 843, n. 22 (1975 Ed.).

Since the *United Steelworkers* case, no Court, other than the Court of Appeals for the Ninth Circuit, has applied *Russell* so as to enlarge federal diversity by ignoring the citizenship of the owners, principals and real parties in interest of "juridical persons". Clearly, *Russell* in no manner supports the Court's holding.

In its opinion, the Court of Appeals also cites two District Court cases for the proposition that 28 U.S.C. Section "1332(a)(2) applies to foreign legal entities of all kinds, so long as the entity is considered a juridical person under the law that created it," *citing Fasco, A.G. v. Modernage, Inc.*, 311 F.Supp. 161, (W.D. Pa. 1970), and *Batson Yarn & Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH Allgauer Machinubau,* 311 F.Supp. 68 (D.S.C. 1970). (App. at). However, in *both* cases the foreign entity was indisputably a "foreign corporation" within *Steamship Co. v. Tugman,* 106 U.S. 118 (1882), and the phrase "juridical person" is never even used. In *Fasco,* the Court blandly asserted that the party was a

"foreign corporation". 311 F.Supp. at 162. In *Batson*, the Court referred to the defendant as "a corporation of West Germany". 311 F.Supp. at 69-70. Apparently, in neither case did any party assert that the foreign entity was not a foreign corporation and clearly the District Courts did not analyze the question.

Here, on the other hand, Rosenfeld demonstrated "persuasively that the anstalt resembles a business trust but not a corporation." (App. at A5). Of course, a domestic business trust and other non-corporate entities are *not* entitled to the conclusive presumption; rather the citizenship of the real parties in the controversy must be examined in order to determine whether diversity jurisdiction exists. *Navarro Savings & Loan Ass'n v. Lee*, 446 U.S. 458 (1980); *Great Southern Fireproof Hotel v. Jones*, 177 U.S. 449, 456 (1900); *Trent Realty Co. v. First Federal Savings & Loan Ass'n.*, 657 F.2d 29, 31-32 (3d Cir. 1981); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n.*, 554 F.2d 1254 (3d Cir. 1977); *Baer v. United Service Auto. Ass'n.*, 503 F.2d 393 (2d Cir. 1974); *Jim Walters Investors v. Empire-Madison, Inc.*, 401 F.Supp. 425, 427 (D. Ga., 1975); *Grynberg v. B.B.L. Assoc.*, 436 F.Supp. 546, 548 (D. Col., 1977). The Court of Appeals has departed from these decisions and found diversity without any proof of the citizenship of the real parties to the controversy.

Further, the Court of Appeals also ignores the distinction drawn in footnote 9 of *Navarro*, between "real parties in interest" as used in Rule 17(a) of the Federal Rules of Civil Procedure, "and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy." The Court lept from the fact that a "juridical person" can sue in its own name, to the conclusion that a foreign juridical person must be the real

party to the controversy. While jural entities can sue in their own name, it has long been held that, unless corporate, the citizenship of the owners determines whether diversity exists. *See, e.g., Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 455-56 (1900). ("[T]he capacity to sue and be sued by the name of the association does not make the plaintiff (limited partnership) a corporation within the rule that a suit by or against a corporation . . . is conclusively presumed to be one by or against citizens of the State creating the corporation").

Applying *Navarro* to this case, just as *Steamship Co. v. Tugman* applied *Marshall* to foreign corporations, would compel the conclusion that Michael Arthur failed to establish federal diversity jurisdiction in this case. Michael Arthur has refused to disclose its principals or owners, who very well may be citizens of the same State as Rosenfeld. Indeed, Cohn is in the business of dealing with American motion pictures. It is not unreasonable to assume that some of his partners or investors are American. Neither has Michael Arthur shown the owners and principals, who may participate directly in deals, have so little control that their citizenship is not properly considered. *Navarro,* J. Blackman, *dissenting.*

If the Appellate Court's far-reaching decision is allowed to stand then the conclusive presumption of citizenship that was strictly limited to domestic corporations by 28 U.S.C. §1332(c) would be rendered meaningless. Instead, every association of any kind that is blessed with a foreign-state designation as a "juridical person" would be entitled to the conclusive presumption provided foreign corporations by *Steamship Co. v. Tugman,* notwithstanding the association's form, attributes, structure or organization, or the actual citizenship of the real parties in interest.

This extraordinary departure from the requirement of true diversity will work to expand federal jurisdiction of *e.g.*, suits between a citizen of California and a Bermuda limited partnership whose general and limited partners are all California citizens. Rosenfeld respectfully submits that such a result is neither required nor prudent. Surely, refusing to so expand diversity jurisdiction does not in any manner "infringe improperly on the sovereignty of foreign nations", as the Appellate Court mused. Without adopting the Court of Appeal's broad ruling, foreign non-corporate "juridical" entities could still sue in federal court if they simply made the traditional showing that there is diversity of citizenship between the real parties to the controversy. Any other rule elevates form over substance, ignores the strict limitations on the federal court's jurisdiction and would enable citizens of a single State to sue in the District Court simply by using any foreign legal entity as a front.

The Ninth Circuit's opinion is wrong as a matter of law and unwise as a matter of policy. And if it is not reversed, it will open up the already overcrowded and overburdened District Courts in the Ninth Judicial Circuit to diversity suits involving non-corporate business entities of all types, be they real estate investment trusts, express trusts, anstalts, foundations, limited partnerships, or associations without regard to the existence of diversity of citizenship between the real parties in interest.

2. The Trial Court Awarded "Lost Profits" From an Unlawful Block-Booking Scheme.

Michael Arthur and Cohn's contemplated deal with ARD was a classic block-booking arrangement, long held illegal in the United States as violating Section 1 of the Sherman Act. *United States v. Paramount Pictures,* 334 U.S. 131 (1947); *United States v. Loew's, Inc.,* 371 U.S. 38(1962). To allow Michael Arthur and Cohn to recover

the profits they would have received from that unlawful practice as damages is contrary to California law.

California Civil Code Section 1550 provides in part that "[i]t is essential to the existence of a contract that there should be: . . .[a] lawful object; . . . .". Civil Code Section 1667 states that a contract or object is not lawful if it is:

1. Contrary to an express provision of the law;
2. Contrary to the policy of express law, though not expressly prohibited; or
3. Otherwise contrary to good morals.

Since Michael Arthur and Cohn's block-busting scheme was contrary to law, and the policy behind the law, the award of fictitious profits based thereon violates California law.

Furthermore, block-booking arrangements are *per se* violations of the Sherman Act for the very reason that they create artificial and arbitrary prices of the films. The Trial court assessment of damages *based upon* the arbitrary and artificial prices set in the block-booking deals is therefore inherently arbitrary and unreasonable. Since California law prohibits unreasonable or unconscionable damage awards, Cal. Civ. Code §3359, the Court simply cannot damage for "lost profits" based on such capricious and unlawful practices.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated: August 31, 1984

Respectfully submitted,

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APPENDIX

A1

FILED
APR 25 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR COHN, and MICHAEL ARTHUR FILM PRODUCTIONS, a company doing business under the laws of Lichtenstein,	No. 83-5729 D.C. No.
Plaintiffs-Appellees,	CV 78-4309-WMB
-vs-	
RICHARD L. ROSENFELD,	OPINION
Defendant-Appellant.	

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding
Argued December 7, 1983; Submitted January 23, 1984

BEFORE: GOODWIN, WALLACE, and TANG,
Circuit Judges.

WALLACE, Circuit Judge:

Rosenfeld appeals from a judgment in favor of Cohn and Michael Arthur Film Productions (Film Productions) on their breach of contract claims. Rosenfeld argues that the district court lacked subject matter jurisdiction and that it erred by awarding Cohn and Film Productions damages for their lost profits. Rosenfeld also claims that the district court abused its discretion by not disqualifying the law firm representing Cohn and Film Productions. We affirm.

I

Rosenfeld is a citizen of California and a distributor of motion pictures. Cohn is a citizen of Switzerland and one of the owners of Film Productions, a limited liability company organized under the laws of Liechtenstein and known as an "anstalt" or establishment." In July of 1977 Rosenfeld entered into a written licensing agreement with Cohn and Film Productions. The agreement granted Film Productions exclusive exhibition and exploitation rights to seven full-length films in the German-speaking portions of Europe for a ten year period beginning in March 1979. Rosenfeld received half of the $20,000 licensing fee at the time the agreement was executed.

In December 1977, Film Productions reached an oral agreement to license a package of thirty motion pictures to a German television network. This package included three of Rosenfeld's films. Following the standard practice of the motion picture industry in Europe, the licensing agreement with the German network called for a licensing fee of 126,000 DM for each of the thirty films. This "block booking" practice allows European film distributors to offset the effects of relatively low maximum licensing fees by mixing high and low grade motion pictures in a "package" of films. Film Productions paid a 7.5% commission to a German distributor for negotiating the agreement with the German network.

Approximately one month later, Rosenfeld notified Cohn that he was terminating the licensing agreement with Film Productions. When the previous licensee exercised its option to renew its license, Rosenfeld informed Cohn that he could no longer deliver the films to Film Productions. The cancellation of this agreement caused Film Productions to terminate its package licensing agreement with the network. Following the cancellation of the network licensing

agreement, Film Productions, through a subsidiary, entered into a licensing agreement with another German film distributor. Under that agreement, Film Productions's subsidiary received 100,000 DM for each of ninety-six films. This subsequent agreement included the thirty films from the cancelled network package, less the three Rosenfeld declined to deliver because of his renewal obligation.

Cohn and Film Productions filed this diversity action in the Central District of California, seeking damages from Rosenfeld for his breach of the licensing agreement. Following a bench trial, the district court granted judgment to Cohn and Film Productions and awarded them $350,455.61 in damages. Rosenfeld moved for a new trial on the limited issue of jurisdiction. The court held that diversity jurisdiction existed and reinstated the previous judgment.

II

Rosenfeld's primary contention on appeal is that Cohn and Film Productions failed to establish the facts necessary to support diversity jurisdiction in the federal courts. Specifically, Rosenfeld argues that Film Productions, a Liechtenstein anstalt, is not a corporation for purposes of 28 U.S.C. §1332(c). Accordingly, Rosenfeld claims that the district court should have determined diversity in this case on the basis of the citizenship of Film Productions's individual owners rather than on its place of organization. Because we require complete diversity, *see, e.g., Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 373-74 (1978); *Dolch v. United California Bank,* 702 F.2d 178, 181-82 (9th Cir. 1983), under Rosenfeld's theory if even one of Film Productions's owners was a United States citizen domiciled in California, *see Kantor v. Wellesley Galleries, Ltd.,* 704 F2d 1088, 1090 (9th Cir. 1983), the district court lacked subject matter jurisdiction.

Cohn and Film Productions, however, have refused to identify the owners of Film Productions.

The district court determined that jurisdiction existed in this case by applying a rule of law to undisputed facts. We therefore review the jurisdictional issue de novo. *See United States v. One Twin Engine Beech Airplane,* 533 F.2d 1106, 1108 (9th Cir. 1976); 5A J. Moore, *Moore's Federal Practice* §52.03[2] (2d ed. 1982).

Rosenfeld argues that corporations represent the only exception to the general rule that we determine an entity's citizenship for purposes of diversity jurisdiction by reference to the citizenship of its individual members. He relies primarily on the Supreme Court's decisions in *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.,* 382 U.S. 145 (1965) (*Bouligny*), and *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449 (1900) (*Great Southern*). In *Bouligny,* the district court saw "no common sense reason for treating an unincorporated national labor union differently from a corporation" for purposes of diversity jurisdiction. *See* 382 U.S. at 146. The Supreme Court disagreed and adhered to the "generally prevailing principle that an unincorporated association's citizenship is that of each of its members." *Id.* Similarly, in *Great Southern,* the Court refused to treat a limited partnership as a corporation for federal diversity jurisdiction purposes where the state accorded limited partnerships some, but not all, of the characteristics of a corporation. 177 U.S. at 457. Relying on the principles announced in *Bouligny* and *Great Southern,* Rosenfeld contends that anstalts are not corporations under Liechtenstein law and thus cannot come within the exception established by 28 U.S.C. §1332(c).

Liechtenstein does allow the formation of corporations but anstalts differ markedly from corporations in Liechten-

stein. Rosenfeld argues persuasively that the anstalt resembles a business trust but not a corporation. Accepting that argument, however, does not answer the basic question before us.

We find Rosenfeld's reliance on *Bouligny* and *Great Southern* misplaced and his attempt to analyze the "corporateness" of foreign business entities such as Liechtenstein's anstalt fundamentally wrong. The determinative question in this case is not whether Film Productions is a corporation for purposes of 28 U.S.C. § 1332(c), but instead whether Film Productions is "a citizen or subject" of a foreign state under 28 U.S.C. § 1332(a)(2). The most relevant Supreme Court precedent is thus *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933) (*Russell*), rather than *Bouligny* or *Great Southern*. In *Russell*, jurisdiction depended on the treatment of a *sociedad en comandita*, a Puerto Rican business entity similar to a limited partnership. The Court distinguished "the tradition of the common law," which classified legal entities as either corporations or partnerships, from the more diverse tradition of the civil law as expressed in the Code of Puerto Rico. 288 U.S. at 480-41. The Court concluded:

> In the law of its creation the *sociedad* is consistently regarded as a juridical person. . . . That personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law.

Id. at 481-82. Although courts and commentators have read the holding in *Russell* narrowly, *see* 13 C. Wright, A Miller & E. Cooper, *Federal Practice and Procedure* § 3630 & n.22 (1975), we find it persuasive in the present case. Indeed, the Court in *Bouligny* characterized the

Russell decision as presenting the "[problem] of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." 382 U.S. at 151. The present case raises precisely that problem.

The parties have cited us no reported decision of any federal court, nor have we found any federal case, discussing whether a Liechtenstein anstalt is a juridical person for purposes of federal diversity jurisdiction. Federal courts applied section 1332(a)(2) to Liechtenstein anstalts in *James Wood General Trading Establishment v. Coe,* 297 F.2d 651, 652-53 (2d Cir. 1961), and *Baker v. Gotz,* 336 F.Supp. 197, 200 (D. Del. 1971), *aff'd without opinion,* 492 F.2d 1238 (3d Cir.), *cer. denied,* 417 U.S. 955 (1974), but apparently no one questioned jurisdiction in either case. Indeed, federal courts have had difficulty explicitly characterizing this unique business entity. They have described anstalts as: "corporation[s] . . . similar to a one-man corporation," *Krause v. Commissioner,* 59 T.C. 681, 685 (1973); "trust[s]," *Ronson Corp. v. Liguifin A.G.,* 370 F. Supp. 597, 603 (D.N.J.), *aff'd,* 497 F.2d 394 (3d Cir.), *cert. denied,* 419 U.S. 870 (1974); and "business entit[ies] peculiar to Liechtenstein," *United States v. Koenig,* 388 F. Supp. 670, 692 (S.D.N.Y. 1974).

However, we need not resolve the question of which common law entity anstalts most nearly resemble. Section 1332(a)(2) applies to foreign legal entities of all kinds, so long as the entity is considered a juridical person under the law that created it. *See, e.g., Fasco, A.G. v. Modernage, Inc.,* 311 F. Supp. 161, 162 (W.D. Pa. 1970) (foreign Aktiengesellschaft creates diversity under 1332(a)(2)); *Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allagauer Machinebau,* 311 F. Supp. 68, 70 (D.S.C. 1970) (GmbH creates diversity under 1332(a)(2)). We have no doubt that Liechtenstein

regards anstalts as juridical persons under its laws. Anstalts have liability limited to their capitalization and can both sue and be sued in their own names. Any recovery by an anstalt in such litigation becomes an asset of the anstalt. Moreover, the relevant Liechtenstein statute states that an anstalt "is a legally independently organized enterprise . . . subject to the regulations governing trust companies *with juridical personality.*" Das Personenund Gessellschaftsrecht, art. 534 (LLGB1 1926 No. 4, as amended) (translated) (emphasis added). Like the *sociedad* in *Russell,* the anstalt presents an exotic creation of the civil law that is regarded as a juridical person by the law that created it. *See also* P. Marxer and A. Goop, The formation of undertakings in Liechtenstein A Guide 19 (n.d.) ("The Establishment [anstalt] is a very unusual form of an institution of civil law with legal personality."). We therefore conclude that Film Productions is a "citizen or subject" of Liechtenstein for purposes of 28 U.S.C. § 1332(a)(2) and the district court had jurisdiction to hear this case.

This case might require application of section 1332(c) if Film Productions had its principal place of business in the United States. *Compare Eisenberg v. Commercial Union Assurance Co.,* 189 F. Supp. 500, 501-02 (S.D.N.Y. 1960) (1332(c) does not apply), *with Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.,* 358 F. Supp. 1001, 1005-08 (M.D. I11. 1973) (1332(c) does apply; *see generally Jerguson v. Blue Dot Investment, Inc.,* 659 F.2d 31, 32-36 (5th Cir. 1981), *cert. denied,* 456 U.S. 946 (1982); 13 C. Wright, A. Miller & E. Cooper, *supra,* at § 3628. We need not resolve the question, however, because Film Productions does not have its principal place of business in the United States.

Finally, Rosenfeld argues that the interpretation of section 1332(a)(2) which we adopt is unfair to unincorpor-

ated American entities. He claims that treating recognized foreign entities as "entities" rather than "corporations" for purposes of diversity jurisdiction gives unincorporated foreign entities an advantage not enjoyed by similar American entities. This argument is unpersuasive. Federal courts have long recognized that other nations, particularly civil law nations, have evolved a scheme of business entities markedly different from that found in the United States. *See Russell,* 288 U.S. at 480-82. Rosenfeld's attempt to compare unincorporated American business entities with unincorporated civil law business entities is therefore virtually meaningless.

Making the distinction Rosenfeld advocates might also infringe improperly on the sovereignty of foreign nations. Foreign legal entities need not have the same attributes as an American corporation to sue in the federal courts. Foreign nations make their own laws regarding the formation of legal entities. Under section 1332(a)(2) we ask only whether an entity is regarded as a juridical person by the law under which it was formed. Any further limitation on the standing of these "citizens or subjects" of foreign states would involve judicial encroachment on the sovereignty of the nation that formed them. Courts lack the information, expertise, and political judgment in foreign affairs to undertake this burden. If the disparate treatment accorded American and foreign unincorporated entities by the diversity statute appears improper, the remedy lies with Congress. *Cf. Chemical Transportation Corp. v. Metropolitan Petroleum Corp.*, 246 F. Supp. 563, 567 (S.D.N.Y. 1964) (reaching the same conclusion about congressional rather than judicial extension of section 1332(c) to foreign corporations).

III

In addition to challenging the district court's jurisdiction, Rosenfeld contends it erred by awarding Cohn and Film Productions damages for profits lost as a result of Rosenfeld's breach of the licensing agreement. Essentially, Rosenfeld asserts that it was improper to award Cohn and Film Productions their lost profits because the amount of those profits was unforeseeable, Cohn and Fillm Productions failed to mitigate their damages, and the damages awarded were speculative.

Both parties concede that California law governs this diversity action. California law provides for the recovery of damages for breach of contract "which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code §3300 (West 1970). California decisions interpreting this section allow the recovery of lost profits where both parties contemplated a resale of contract goods by the purchaser. *E.g., Tomlinson v. Wander Seed & Bulb Co.*, 177 Cal. App. 2d 462, 472-73, 2 Cal. Rptr. 310, 316 (1960). In the case before us, the district court found that Rosenfeld knew that Cohn was attempting to obtain the films for redistribution in Europe. The evidence shows that Rosenfeld had previously licensed some of the same films to another European distributor. As a sophisticated businessman with experience in motion picture distribution, Rosenfeld must have known that Cohn and Film Productions intended to resell the films. The district court's finding concerning the nature of the transaction was not clearly erroneous. Cohn and Film Productions were therefore entitled to recover their lost profits.

Rosenfeld also claims that Cohn and Film Productions may not recover their lost profits because they failed to

mitigate their damages. Rosenfeld argues that Cohn could easily have substituted three "second rate" pictures in the proposed German network package after he learned that Rosenfeld could not fulfill the contract. The record raises conflicting inferences on the mitigation issue. The district court apparently resolved this factual dispute in favor of Cohn and Film Productions. The record indicates that the German network had a particular interest in one or more of the specific films Cohn agreed to license from Rosenfeld. Further, Cohn testified that substitution of other films for the missing Rosenfeld films in the German network package would have upset the "balance" of films in other packages Cohn was planning to market. In view of this evidence, we cannot conclude that the district court's findings on the issue of mitigation were clearly erroneous.

Rosenfeld's remaining objections to the damages award are that it was speculative and unconscionable. However, the district judge carefully considered the amount of damages suffered by Cohn and Film Productions and his detailed findings of fact indicate precisely how the amount of damages were determined. These calculations do not reflect any impermissible degree of speculation. Rosenfeld's claim that the amount of damages is unconscionable is similarly unpersuasive. His reliance upon *Schmidt v. Beckelman*, 187 Cal. App. 2d 462, 471, 9 Cal. Rptr. 736, 742 (1960), is misplaced because the case before us does not involve circumstances in which "the buyers took unfair advantage of the ignorance of the seller." *Id.* Instead, Rosenfeld is an experienced, sophisticated businessman who was aware of the nature of his agreement with Cohn and Film Productions.

IV

Finally, Rosenfeld claims the district court abused its discretion in denying his motion to disquality the law firm

representing Cohn and Film Productions. Rosenfeld asserts that his previous relationship with a member of the law firm created a conflict of interest in the present action. We have frequently stated that the district court has the primary responsibility for controlling the conduct of the attorneys practicing before it. *E.g., Trone v. Smith,* 621 F.2d 994, 999 (9th Cir. 1980). Accordingly, we will not disturb a district court's ruling on a motion to disqualify counsel "if the record reveals 'any sound' basis for the court's action." *Paul E. Iacono Structural Engineer, Inc. v. Humphrey,* 722 F.2d 435, 438 (9th Cir. 1983), *quoting Gas-A-Tron of Arizona v. Union Oil Co. of California,* 534 F.2d 1322, 1325 (9th Cir.), *cert. denied,* 429 U.S. 861 (1976). The record provides ample support for the court's action in the present case. Rosenfeld's claimed "relationship" with a member of the law firm amounted to no more than incidental social contacts and a completely unrelated business transaction. The district court did not abuse its discretion by refusing to disquality the law firm.

AFFIRMED.

FILED
JUL 26 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR COHN, et al.,	)	No. 83-5729
Plaintiffs-Appellees,	)	
	)	DC# CV 4309
vs.	)	-WMB
RICHARD L. ROSENFELD,	)	Central California
Defendant-Appellant.	)	O R D E R

Before: GOODWIN, WALLACE, and TANG, Circuit Judges.

The motion to recall the mandate is denied. The motion for an extension of time to file a petition for rehearing with a suggestion for rehearing en banc is denied as moot.

Supreme Court of the United States

No. A-25

RICHARD L. ROSENFELD,

Petitioner,

v.

ARTHUR COHEN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s), It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 31, 1984.

/s/ William H. Rehnquist

Associate Justice of the Supreme Court of the United States

Dated this 16th
day of July, 1984.

FILED
OCT 15 1979
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

A14

ENTERED
OCT 16 1979
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARTHUR COHN, and MICHAEL ARTHUR FILM PRODUCTIONS, a company doing business under the laws of Lichtenstein, Plaintiffs, v. RICHARD L. ROSENFELD, Defendant.	CV 78-4309-WMB AMENDED JUDGMENT

This action was tried before the Court sitting without a jury. The Court having heard the testimony and arguments on behalf of respective parties and having filed both its Findings of Fact and Conclusions of Law now, therefore, IT IS ORDERED, ADJUDGED AND DECREED that judgment be and the same hereby is entered in favor of plaintiffs, Arthur Cohn and Michael Arthur Film Productions, awarding damages against defendant, Richard L. Rosenfeld, in the amount of $350,455.61 and costs in the amount of $_____.

DATED: Oct 15, 1979

Wm. Matthew Byrne, Jr.
United States District Judge

FILED
OCT 15 1979
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARTHUR COHN, and MICHAEL ARTHUR FILM PRODUCTIONS, a company doing business under the laws of Lichtenstein, Plaintiffs, v. RICHARD L. ROSENFELD, Defendant.	CV 78-4309 -WMB FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The amount in controvery exceeds the sum of $10,000, excluding interest and costs.

2. Plaintiff Arthur Cohn is a citizen of Switzerland, residing in Basel.

3. Plaintiff Michael Arthur Film Productions ("Michael Arthur") is a limited liability company, duly organized and existing under the laws of Lichtenstein, and has its principal place of business in Vaduz, Lichtenstein.

4. Defendant Richard L. Rosenfeld was and is a citizen of the States of California, conducting business within the Central District of California.

5. On or about February 9, 1968, defendant entered into a licensing agreement with Taurus-Film GMBH & Co. ("Taurus"), doing business in Munich, West Germany, by which agreement defendant, as licensor, granted to Taurus sole and exclusive exhibition and exploitation rights to thirteen motion pictures for a period of ten years in the territory of West Germany, West Berlin, East Germany, East Berlin, Austria and Switzerland. A true and correct copy of said agreement is attached to the first amended complaint as "Exhibit A".

6. On or about July 7, 1977, defendant entered into a written licensing agreement with plaintiffs, by which agreement defendant, as licensor, granted to plaintiffs as licensees, the sole and exclusive exhibition and exploitation rights to seven motion pictures in the territory of East Germany, West Germany, Austria and German-speaking Switzerland, for a period of ten years. Such period was to commence at or about the beginning of 1979, after defendant's agreement with Taurus was to terminate by its own terms. The motion pictures which were the subject of this agreement were the following: "Arch of Triumph"; "Body and Soul"; "Caught"; "Dark Mirror"; "Letter from an Unknown Woman"; "Macbeth"; and "Secret Beyond the Door." A true and correct copy of this agreement is attached to the first amended complaint as "Exhibit C".

7. On or about June 9, 1977, defendant sent a letter to plaintiffs wherein he represented to plaintiffs that he owned and had the absolute right to license for exhibition and exploitation the following motion pictures: "Arch of Triumph"; "Caught"; "Dark Mirror"; "Letter from an Unknown Woman"; "Macbeth"; and "Secret Beyond the Door." A true and correct copy of said letter is attached to the first amended complaint as "Exhibit G".

8, In the July 7, 1977 licensing agreement, defendant warranted and guaranteed that the seven subject motion pictures were owned by him and that he had the absolute right to enter into said licensing agreement.

9. Plaintiff had a right to rely on defendant's representations that he had no further contracts with Taurus or any other person or entity with respect to the seven subject motion pictures, and that he owned and had the absolute right to license the subject motion pictures.

10. The July 7, 1977 licensing agreement provided in part that, as consideration for the license, plaintiffs would pay $10,000 upon execution of the agreement, and $10,000 upon receipt of the seven subject motion pictures. In compliance with said provisions of the licensing agreement, plaintiffs paid defendant the sum of $10,000 upon execution of said agreement. Defendant received and has retained this sum.

11. On or about February 2, 1978, defendant entered into a licensing agreement with Taurus by which agreement defendant, as licensor, granted to Taurus, as licensee, the sole and exclusive rights to exhibit and exploit, for periods of time concurrent with those of the July 7, 1977 agreement with plaintiffs, eleven motion pictures under the terms of the above-referenced February 9, 1968 agreement. The eleven films which were the subject of the February 2, 1978 agreement included, *inter alia*, "Arch of Triumph"; "Caught"; "Dark Mirror"; "Letter from an Unknown Woman"; "Macbeth"; and "Secret Beyond the Door," which motion pictures, and each of them, were subjects of the July 7, 1977 licensing agreement made between defendant and plaintiffs. A true and correct copy of said February 2, 1978 licensing agreement is attached to the first amended complaint as "Exhibit D".

12. In or about January, 1978, defendant notified plaintiffs by telephone that he refused to honor his July 7, 1977 agreement with plaintiffs.

13. On or about February 24, 1978, defendant informed plaintiffs in a letter addressed to plaintiff Cohn at Gellertstrasse 18, Basel, Switzerland, that defendant refused to honor his July 7, 1977 agreement with plaintiffs. A true and correct copy of this letter is attached to the first amended complaint as "Exhibit E".

14. On or about February 24, 1978, defendant wrote a second letter to plaintiff Cohn, which letter was addressed c/o Michael Arthur Film Productions, Vaduz, Lichtenstein. In this letter, defendant reiterated his intention to breach his July 7, 1977 agreement with plaintiffs. A true and correct copy of this letter is attached to the first amended complaint as "Exhibit F".

15. Defendant has persisted in his refusal to perform the conditions, covenants and promises under the July 7, 1977 agreement, on his part to be performed.

16. Plaintiffs had performed all of the conditions and acts on their part to be performed, and were and are ready, able and willing to complete performance on their part under the July 7, 1977 agreement.

17. Defendant, prior to entering into the July 7, 1977 agreement with plaintiffs and thereafter, was told by plaintiffs and otherwise knew that plaintiff's purpose in entering into the July 7, 1977 agreement was to obtain motion pictures to license to German television stations or networks in a package with other motion pictures.

18. Based upon the July 7, 1977 agreement with defendant, plaintiffs entered into an oral agrement to license three of the seven subject motion pictures, along with twenty-seven

other motion pictures, to the First German Television Channel ("ARD") for 126,000 German marks ("DM") per motion picture. The three films were "Secret Beyond the Door," "Dark Mirror," and "Macbeth."

19. Plaintiffs paid Apollon Verlag GMBH a commission of 280,000 DM (7-1/2 percent of the entire purchase price of 3,780,000 DM) as a commission for negotiating the agreement with ARD.

20. The standard maximum licensing fee paid by German television for each motion picture is 126,000 DM. Such standard price may apply no matter what the length, quality and/or box office success of the motion picture is or has been.

21. The practice of selling motion pictures in packages to television is accepted and standard in all relevant parts of Europe, as is the practice of receiving a standard price for each motion picture in such package.

22. If defendant had delivered the seven motion pictures in question to plaintiffs, plaintiffs would have had one hundred and three (103) motion pictures available to sell.

23. If defendant had not breached his contract with plaintiffs, plaintiffs would have received 3,780,000 DM (thirty pictures at 126,000 DM each) for the sale of the thirty motion pictures included in the ARD package.

24. Plaintiffs received 9,600,000 DM for the sale of the ninety-six picture package to Curator Verlag in 1978. This sale could not have been completed had not defendant breached his contract with plaintiffs and plaintiffs been unable to complete the sale of the ARD package.

25. If the sale of the ARD package had been consummated, the remaining 73 pictures which plaintiffs had available for sale could have been sold for 90,000 DM each for a total of 6,570,000 DM. This amount of 90,000 DM per motion

picture is arrived at by reducing the amount plaintiff received for the sale of the ninety-six picture package to Curator Verlag in 1978 (9,600,000 DM) by the apparent value of the twenty-seven of these ninety-six pictures that were to have been included in the ARD package (27 x 126,000 DM or 3,402,000 DM), and dividing the resulting amount (6,198,000 DM) by the number of remaining pictures (sixty-nine).

26. Plaintiffs are entitled to damages for breach of contract in the amount of 3,780,000 DM (the amount plaintiffs would have received for sale of the ARD package), plus 6,570,000 DM (the amount plaintiffs would have received for sale of the remaining seventy-three pictures), less 9,600,000 DM (the amount plaintiffs received for sale of the ninety-six picture package to Curator Verlag), for a total amount of damages of 750,000 DM.

27. The court finds that, because plaintiffs are receiving damages based on the full value of the uncompleted sale of the ARD package, plaintiffs are not entitled to recover the commission paid to Apollon for negotiating that sale agreement. Nor are plaintiffs entitled to recover the $10,000 paid to defendant. In addition, the damages should be reduced $10,000, the amount which plaintiffs would have been obligated to pay defendant, had the July 7, 1977 agreement been consummated.

28. The appropriate time at which to convert German marks into American dollars for purposes of calculating damages is at the time of defendant's breach — in and about February, 1978. At such time the exchange rate was 2.0807 German marks for every one American dollar.

29. Using the rate of exchange of 2.0807 DM for one American dollar, which rate of exchange was current in February, 1978, the amount of damages enumerated in paragraph 26 hereinabove is $360,455.61 (750,000 DM).

30. After deducting the $10,000 referred to in paragraph 27, the total amount of damages awarded is $350,455.61.

31. No punitive damages are awarded.

32. Any Conclusions of Law, to the extent they are deemed to be Findings of Fact, are incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Any Findings of Fact, to the extent they are deemed to be Conclusions of Law, are incorporated into these Conclusions of Law.

2. This Court has jurisdiction of the parties to and subject matter of this action.

3. The July 7, 1977 contract between plaintiffs and defendant was valid and binding when executed.

4. Plaintiffs performed all of the conditions and acts on their part to be performed under the July 7, 1977 contract.

5. Defendant's claim for rescission of the July 7, 1977 contract, based on his alleged unilateral mistake of fact, is without merit. *Lawrence v. Shutt,* 269 Cal.App.2d 749 (1969).

6. Defendant breached and totally repudiated the July 7, 1977 contract with plaintiffs.

7. The practice of licensing motion pictures in packages is accepted and standard practice in West Germany.

8. Plaintiffs are entitled to damages in the amount of $350,455.61.

DATED: Oct 15, 1979

Wm. Matthew Byrne, Jr.
United States District Judge

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
FEB 23 1983
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARTHUR COHN, and MICHAEL ARTHUR FILM PRODUCTIONS, a company doing business under the laws of Lichtenstein, Plaintiffs, v. RICHARD L. ROSENFELD, Defendant.	CV 78-4309-WMB ORDER

This case arises from claims for breach of contract and fraud by plaintiffs, Arthur Cohn and Michael Arthur Film Productions, against Richard L. Rosenfeld. This Court, sitting without a jury, tried the action, gave its findings of fact and conclusions of law, and entered judgment for plaintiffs in the amount of $350,455.61 plus costs. Subsequently, the judgment was held in abeyance, and a new trial was held on the single issue: whether plaintiffs had failed to establish subject matter jurisdiction based on diversity, 28 U.S.C. § 1332 (1976).

For the following reasons, the Court finds that jurisdiction does exist under § 1332, and therefore the order holding the judgment in abeyance is hereby withdrawn.

The diversity jurisdictional statute, 28 U.S.C. § 1332, provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> . . . .
>
> (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

Rosenfeld, a citizen of California, argues that Michael Arthur Film Productions (M.A.F.P.) is not a diverse "corporation" within the meaning of § 1332(c). M.A.F.P. is a company organized under the laws of Lichtenstein, known as an *anstalt* or "establishment." M.A.F.P. contends that it is similar in many, if not most, respects to an American corporation, and should therefore be treated as one for the purposes of § 1332(c). Both sides have briefed the issue extensively, and testimony was adduced at trial regarding the relative similarities and differences between an *anstalt* and an American corporation.

This issue, whether § 1332(c) may be applied to foreign corporations, was discussed at length in *Jerguson v. Blue Dot Investment, Inc.*, 659 F.2d 31, 32-36 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2013 (1982). In *Jerguson*, the defendant was a Panamanian corporation with its principal place of business in Florida, and the issue was whether it should be treated as a citizen of that state under § 1332(c). The court noted that a split of authority existed on this issue in the various district courts and that the issue had not been addressed by a federal

appeals court. 659 F.2d at 33. The court stated that *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500 (S.D.N.Y. 1960), was the leading case holding that § 1332(c) *never* applies to an alien corporation, while *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001 (N.D. Ill. 1973), was the leading case holding that, when a foreign corporation has its principal place of business in one of the United States, § 1332(c) requires that the corporation be treated as a citizen of both the state of its incorporation and of the state in which it has its principal place of business. 659 F.2d at 33-34. The *Jerguson* court found that *Southeast Guaranty Trust* stated the better reasoned rule, and accordingly, held that the Panamanian corporation was a resident of Florida under § 1332(c). Judge Kelleher reached the same conclusion in *Hawaiian Agronomics Co. v. Government of Iran*, 518 F. Supp. 596, 597 (C.D. Cal. 1981) (Liberian corporation with principal place of business in Hawaii).

However, *Jerguson, Southeast Guaranty Trust*, and *Eisenberg* are all in agreement on one issue: section 1332(c) *never* applies to an alien corporation with its principal place of business outside the United States. The word "State" is capitalized in § 1332(c), and subsection (d) of that statute defines "States" to include only "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico" with no mention of foreign states. *Jerguson*, 659 F.2d at 35; *Southeast Guaranty Trust*, 358 F. Supp. at 1007; *Eisenberg*, 189 F. Supp. at 502. No case has ever suggested that § 1332(c) applies to a wholly alien corporation, which is not "a citizen of any State." *See generally* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3628 (1975 & Supp. 1980).

Therefore, M.A.F.P., as a company organized under the laws of Lichtenstein with its principal place of business in Vaduz, Lichtenstein, should not be treated as a "corporation" within the meaning of § 1332(c), and cases construing that subsection do not apply. Rather, M.A.F.P. is a "citizen or subject of a foreign state." 28 U.S.C. § 1332(a) (2) (1976).

This subsection applies to foreign business entities of all kinds, which are allowed standing in the federal courts. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 852 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964) (national bank); *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 289 F.2d 346, 347 (2d Cir.) *cert. denied*, 368 U.S. 837 (1961) (Lebanese corporation).; *Kuerschner & Rauchwarenfabrik, A.G. v. New York Trust Co.*, 126 F. Supp. 684, 688 (S.D.N.Y. 1954) (Hungarian *akteingesellschaft*, a European form of business entity). An *anstalt*, the form of business entity at issue here, has been found a diverse party for purposes of diversity jurisdiction under § 1332(a) (2). *James Wood General Trading Establishment v. Coe*, 297 F.2d 651, 653 (2d Cir. 1961); *Baker v. Gotz*, 336 F. Supp. 197, 200 (D. Del. 1971), *aff'd*, 492 F.2d 1238 (3d Cir. 1974)(no opinion). As early as 1882, the Supreme Court recognized the right of alien corporations to sue in the federal courts. "[A] corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State." *Steamship Co. v. Tugman*, 106 U.S. 118, 121 (1882).

An alien corporation need not possess exactly the same attributes as an American corporation to gain standing in the federal courts, nor need it be treated as one. Each foreign state may make its own laws regarding the formation of business associations, and it would be

presumptive to encroach upon their sovereignty. Indeed, no inquiry is made into the citizenship of the owners or directors of an alien business entity, even against the claim that the alien corporation is a mere "facade." *Ferrigno v. Ocean Transport, Ltd.*, 188 F. Supp. 179, 180-81 (S.D.N.Y. 1960), *rev'd on other grounds*, 309 F.2d 445 (2d Cir. 1962). In *Ferrigno*, the plaintiff was an Italian citizen claiming damages for injuries against a Liberian corporation. The defendant was granted a motion to transfer to the admiralty side, on the grounds that § 1332(a) (2) does not grant one alien the right to sue another. *See, e.g., Mattes v. National Hellenic American Line, S.A.*, 427 F. Supp. 619, 628 (S.D.N.Y. 1977). Against the claim that the presence of another alien (the Liberian corporation) destroyed diversity jurisdiction, the plaintiff raised the argument that the corporation was a mere "facade"; he contended that the owners were Americans. But the court refused to consider this argument, stating that "the state of incorporation is the conclusive factor in determining diversity jurisdiction," 188 F. Supp. at 180; *see also Mazzella v. Pan Oceanica A/S Panama*, 232 F. Supp. 29, 31, n.1 (S.D.N.Y. 1964) ("The Court will not look behind the incorporation of Panoceanica in Panama to determine whether [it] is owned by American interests, since this also would be immaterial for diversity purposes.").

If M.A.F.P. is a company organized under the laws of Lichtenstein, and is recognized there as a juridical entity, then it is a citizen or subject of Lichtenstein within the meaning of § 1332(a) (2), just as are the other two forms of business entity in Lichtenstein, the *akteingesellschaft* and the "GMBH", which themselves are not exact equivalents of the American corporation. *E.g., Fasco, A.G. v. Moderanage, Inc.*, 311 F. Supp. 161, 162 (W.D. Pa. 1970) (plaintiff *akteingesellschaft* creates diversity

jurisdiction under § 1332(a) (2)); *Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allagauer Maschinenbau*, 311 F. Supp. 68, 70 (D.S.C. 1970) (defendant GmbH creates diversity jurisdiction under § 1332(a) (2)).

The evidence establishes that M.A.F.P. is a company organized under the laws of Lichtenstein. Arthur Cohn testified that he is a director of the company, which is an *anstalt* under Lichtenstein law. An officially authenticated copy and translation of the company's registration certificate, taken from the Commercial Register in Vaduz, Lichtenstein, was entered into evidence, as were official copies and translations of the by-laws of the company. The registration certificate showed that the company was founded on December 13, 1952, well before the filing of this lawsuit. It further shows that Arthur Cohn is a member of the Board of Administration of the company.

Rosenfeld offered no evidence to indicate that M.A.F.P. is not a company organized under the laws of Lichtenstein. In fact, Rosenfeld's own expert testified that the *anstalt* is a company expressly provided for by statute in Lichtenstein, and stated that he was familiar with such business organizations, as well as with several others provided for under Lichtenstein law. He stated that an *anstalt* may sue or be sued in its own name, and that when a recovery is made it becomes an asset of the company, not the individual owners or directors.

The statute entered in evidence, Das Personenund Gesellschaftsrecht [PGR] (1926) and das Treuunternehmen (Die Geschaftstreuhand) (Tr. U.) (1929) (Art. 932a) (Lichtenstein, provides that the *anstalt* or "[e]stablishment. . . is a legally independently organized enterprise . . . . subject to the regulations governing trust companies *with a juridical personality*.", (Art. 534) (as translated) (emphasis added).

Based on all this evidence, the Court finds that M.A.F.P. is and was, at all times relevant to this action, a company duly organized under the laws of Lichtenstein. M.A.F.P. is a juridical entity there, and thus it is a citizen or subject of a foreign state. 28 U.S.C. § 1332(a) (2). Thus, jurisdiction exists in this Court based on diversity of citizenship, and, therefore, this Court's order holding judgment in abeyance is hereby ORDERED wthdrawn.

IT IS SO ORDERED.

DATED: 2/22/83

Wm. Matthew Byrne, Jr.
United States District Judge

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 31, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

U.S. SUPREME COURT
1 First Street, N.E.
Washington, D.C. 20543
(Delivered: Original & 40 copies)

Patricia L. Glaser, Esq.
Wyman, Bautzer, Rothman, Kuchel & Silbert
2049 Century Park East, 14th Floor
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 31, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)